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James J. Wawrzyn

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PANZER V. DOYLE: WISCONSIN CONSTITUTIONAL LAW DEALS THE GOVERNOR A NEW HAND

I. INTRODUCTION

The fall elections of 2002 brought drastic changes to the Wisconsin state capital. The race for governor had been close and contentious.¹ It resulted in the election of the first Democratic governor in sixteen years: Governor James E. Doyle.² The same election created a Republican majority in the Wisconsin State Senate.³ With the Republicans already comfortably holding a majority in the assembly, this set the new Democratic governor up against a Republican-dominated legislature. Unfortunately, the tribal-state gaming compacts provided the first opportunity for each side to flex its muscle.

Shortly after the inaugurations, news of the amended gaming compacts spread.⁴ Governor Doyle and the tribes had agreed to amendments that called for much larger payments to the State by the tribes.⁵ In exchange, the tribes would receive perpetual compacts that allowed them to offer more games and included a partial waiver of the State's sovereign immunity.⁶

1. See Steven Walters, *Doyle Extends Hand to GOP; Governor-Elect Urges Bipartisan Fix For Deficit*, MILWAUKEE J. SENTINEL, Nov. 7, 2002, at 1A (reporting that Governor-elect Doyle defeated Governor McCallum by a forty-five percent to forty-one percent margin); Jim Stingl, *It's Just Another Playground Fight*, MILWAUKEE J. SENTINEL, Nov. 3, 2002, at 1B (commenting on the contentious nature of the gubernatorial campaign on the eve of the election).

2. WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 2003-2004 BLUE BOOK 695 (2003). According to his biography, Governor Doyle worked as an "attorney for a federal legal services office on [the] Navajo Indian Reservation in Chinle, AZ" from 1972 to 1975. *Id.* at 4.

3. Richard P. Jones, *Recount Ends in Leibham's Favor; Victory Secures GOP's Hold on State Senate*, MILWAUKEE J. SENTINEL, Nov. 27, 2002, at 1B (reporting that the senate Republicans would have an eighteen to fifteen majority).

4. Dennis Chaptman, *Lawmakers Want a Say in State Gaming Deals; Governor Shouldn't Have Sole Authority, Some in GOP Say*, MILWAUKEE J. SENTINEL, Feb. 21, 2003, at 1A.

5. Steve Schultze, *Gaming's New Deal; Tentative Open-Ended Compact Has Oneida Paying More to State*, MILWAUKEE J. SENTINEL 1, Feb. 20, 2003, at 1A.

6. *Id.*

The legislature disapproved.⁷ It quickly passed legislation that would give it a role in the compacting process.⁸ However, Governor Doyle vetoed the bill.⁹ The Republicans did not have large enough majorities, or enough support from Democrats, to get the necessary two-thirds vote to override a gubernatorial veto.¹⁰

After passing another bill, and again failing to override Governor Doyle's veto, the Republican legislative leaders tried a new tactic: they filed suit against Governor Doyle.¹¹ In *Panzer v. Doyle*,¹² the Wisconsin Supreme Court held that Governor Doyle exceeded his authority in negotiating the amendments to the Forest County Potawatomi Community of Wisconsin ("FCP") gaming compact.¹³ Specifically, the court held that the Governor lacked authority to (1) agree to perpetual compacts, (2) waive the State's sovereign immunity, or (3) permit tribes to offer games that are against the State's gambling public policy.¹⁴

This Note clarifies what the likely impact of the *Panzer* decision will be on future gaming compact negotiations and affirms that Wisconsin law, not federal law, best addressed all of the questions presented to the court. Part II of this note provides an overview of gaming in Wisconsin and the series of events that led up to the legislators filing suit.¹⁵ Part III explains the holdings of the court.¹⁶ Part IV clarifies the likely impact of

7. See Steven Walters & Dennis Chaptman, *Potawatomi Make Deal; Pact Allows 24-Hour Betting, Nets State Extra \$78 Million*, MILWAUKEE J. SENTINEL, Feb. 25, 2003, at 1A (reporting that Assembly Speaker John Gard said, "Gov. Doyle's action to announce a sweetheart deal with the Potawatomi today is panicked, partisan and premature").

8. S.B. 41, 2003-05 Session (Wis. 2003).

9. Richard Jones, *Doyle Tells GOP Leaders to Quit Playing Games; As He Pushes Budget, They Say He's Diverting Focus From Casinos*, MILWAUKEE J. SENTINEL, March 6, 2003, at 1B.

10. See *id.*

11. Dennis Chaptman, *GOP Lawmakers to Sue Over Gaming Deal; Doyle Overstepped Power, Leaders Say*, Milw. J. Sentinel, April 2, 2003, at 1B. At a press conference on the day the Supreme Court issued its opinion in *Panzer v. Doyle*, 2004 WI 52, 680 N.W.2d 666, Senate Majority Leader Mary Panzer remarked, "I remember so clearly when Governor Doyle was sworn in, [Chief Justice] Shirley Abrahamson said, jokingly, 'If there's ever a dispute, come to me.' Well, we did that, and we have a decision, and now it's time to move forward." *Gard-Panzer: Decision Means Taxpayers will Get Fair Deal*, May 25, 2004, <http://www.wispolitics.com/index.html?Article=17321>.

12. 2004 WI 52, 680 N.W.2d 666. The Wisconsin Supreme Court took the case as an original action. *Id.*

13. *Id.* ¶ 113, 680 N.W.2d at 701.

14. *Id.* ¶ 5, 680 N.W.2d at 670.

15. See *infra* Part II.

16. See *infra* Part III.

the holdings.¹⁷ Finally, Part V affirms the Wisconsin Supreme Court's jurisdiction to adjudicate the questions raised in *Panzer*.¹⁸

II. THE CONTEXT OF *PANZER V. DOYLE*

To appreciate the *Panzer* court's holdings, it is necessary to understand the legal framework that preceded the decision. Accordingly, this part of the note will consider (A) the Indian Gaming Regulatory Act ("IGRA"), (B) the Wisconsin Legislature's initial reaction to IGRA, (C) the 1992 gaming compacts, (D) the 1993 constitutional amendment, (E) the 1998 gaming compact amendments, and (F) the 2003 gaming compact amendments.

A. *The Indian Gaming Regulatory Act*

In 1988, Congress passed IGRA in response to conflicts that had arisen among tribes and states as tribes made efforts to establish gaming operations.¹⁹ IGRA created a framework to regulate certain forms of reservation gaming.²⁰ This included establishing three categories of games, each having different regulatory characteristics.²¹ Class I games include social games for minimal values, which are typically associated with tribal ceremonies and celebrations.²² Tribes exercise exclusive jurisdiction over Class I games.²³ Class II games include bingo, bingo-type games, and certain non-banking card games.²⁴ Tribes also have jurisdiction over Class II games but must conform with any state statutes related to the games.²⁵ Finally, Class III games are any games not categorized as Class I or Class II games.²⁶ Tribes may offer Class III games on tribal land only if (1) the tribe passes an ordinance permitting them, (2) the tribal land is located in a state that permits such gaming,

17. See *infra* Part IV.

18. See *infra* Part V.

19. Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769, 770 (1995) (providing analysis of the political compromises that gave rise to IGRA).

20. 25 U.S.C. § 2702 (2000).

21. § 2703.

22. § 2703(6).

23. § 2710(a)(1).

24. § 2703(7).

25. § 2710(a)(2).

26. § 2703(8).

and (3) the tribe has entered into a compact with the state.²⁷

Under IGRA, state involvement in Indian gaming is limited to negotiating gaming compacts. IGRA provides the basic procedure for the tribal-state compacting process.²⁸ However, IGRA does not identify who should negotiate on behalf of a state.²⁹ IGRA also leaves unclear a process for determining the specific forms of gaming activities the parties must negotiate.³⁰

B. The Wisconsin Legislature's Reaction to IGRA

The Wisconsin Legislature responded to Congress's passing of IGRA by passing legislation to make the governor the sole negotiator with the tribes.³¹ This legislation became section 14.035 of the Wisconsin Statutes, which states that "[t]he governor may, on behalf of [the] state, enter into any compact that has been negotiated under 25 U.S.C. 2710(d) [of IGRA]."³²

The legislature's delegation of power to the governor occurred after Attorney General Donald Hanaway issued an opinion related to IGRA.³³ The opinion clarified that the legislature had the responsibility of establishing gaming policy for the State.³⁴ The opinion also suggested that the legislature could address Indian gaming by repealing or amending the State's gambling statutes, specifically chapter 945 and chapter 565.³⁵ Additionally, any authorization of new gambling could apply to either the entire State or just Indian country.³⁶

27. § 2710(d)(1).

28. § 2710(d)(3)(A).

29. § 2710(d).

30. See Kevin K. Washburn, *Frontier Justice Symposium Article: Land & Water Law Division: Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 442 (2001) (arguing that although Indian gaming has experienced large growth, it is still an industry full of uncertainties).

31. WIS. STAT. § 14.035 (2003-04).

32. *Id.*

33. 79 Op. Wis. Att'y Gen. 14 (1990).

34. See *id.* at 32; see also *Panzer v. Doyle*, 2004 WI 52, ¶ 18, 680 N.W.2d at 674.

35. 79 Op. Att'y Gen. Wis. 14, 30 (1990). In the opinion, Attorney General Hanaway wrote, "should it choose to do so, the Legislature may authorize casino-type gambling in the State of Wisconsin and, therefore, within Indian country, or just within Indian country. Should it wish to do so, the Legislature need only enact appropriate repeals or modifications to chapters 945 and 565." *Id.* Chapter 945 includes criminal laws related to gambling. WIS. STAT. ch. 945 (2003-04). Chapter 565 includes laws addressing the State lottery. WIS. STAT. ch. 545 (2001-02).

36. 79 Op. Att'y Gen. Wis. 14, 30 (1990).

Rather than addressing Indian gaming in any of the ways suggested by Hanaway, the legislature delegated its power to shape gaming policy to the governor. Amendments to the bill, which would have required the legislature to ratify the compacts agreed upon by the governor, failed during the process of both houses of the legislature approving the bill.³⁷

C. The 1992 Gaming Compacts

The initial tribal-state compact negotiations in 1989 quickly ended up in the federal courts.³⁸ Attorney General Hanaway, whom Governor Tommy G. Thompson directed to negotiate the compacts, believed that many of the games the tribes had an interest in offering were beyond the scope of the negotiations because they were illegal under State law.³⁹ At the time of the negotiations, the Wisconsin Constitution specifically authorized pari-mutuel wagering⁴⁰ and a state-run lottery.⁴¹ Chapter 945 criminalized other forms of gambling.⁴²

The tribes disagreed with Hanaway. Two of the tribes filed a claim in federal court asserting that the State had failed to negotiate in good faith.⁴³ In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*,⁴⁴ the court held that the State needed to include casino games, video games, and slot machines in the negotiations, regardless of

37. *Panzer*, 2004 WI 52, ¶ 19, 680 N.W.2d at 674.

38. DAN RITSCHKE, WISCONSIN LEGISLATIVE REFERENCE BUREAU, THE EVOLUTION OF LEGALIZED GAMBLING IN WISCONSIN, RESEARCH BULLETIN 00-1, 22 (May 2000).

39. 79 Op. Wis. Att'y Gen. 14, 27 (1990).

40. WIS. CONST. art. IV, § 24 (1987). Voters approved the constitutional amendment authorizing pari-mutuel on-track betting by a vote of 580,089 in favor and 529,729 against on April 7, 1987. WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 1987-1988 BLUE BOOK 872 (1987).

41. WIS. CONST. art. IV, § 24 (1987). Voters approved the constitutional amendment authorizing a state-run lottery by a vote of 739,181 in favor and 391,942 against on April 7, 1987. WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 1987-1988 BLUE BOOK 873 (1987). The Wisconsin lottery has a complex history, which is beyond the scope of this note. For a synopsis of the history, see RITSCHKE, *supra* note 38, at 10-14.

42. WIS. STAT. ch. 945 (2003-04). Chapter 945 includes a general bar on gambling, which made it a class B misdemeanor to make a bet, enter a gambling establishment with the intent to make a bet, or conduct a lottery. WIS. STAT. § 945.02.

43. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991). Since *Lac du Flambeau*, the United States Supreme Court has held that 25 U.S.C. § 2710(d)(7), which authorized a tribe to bring suit in federal court to compel a state to negotiate in good faith toward the formulation of a tribal-state compact, violates the Eleventh Amendment. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

44. 770 F. Supp. 480 (W.D. Wis. 1991).

what specific forms of gambling statutes prohibited.⁴⁵

In the months following the district court's ruling, the eleven federally recognized tribes and the State agreed to compacts that generally permitted tribes to operate blackjack, video poker, video slot machines, electronic slot machines, and pull-tabs.⁴⁶ The compacts also included clauses that permitted them to be extended for five years after an initial five years, unless either side desired to negotiate further amendments.⁴⁷

D. The 1993 Constitutional Amendment

In 1993, voters answered "yes" to the following ballot question that related to a proposed constitutional amendment: "Shall article IV of the constitution be revised to clarify that all forms of gambling are prohibited except bingo, raffles, pari-mutuel on-track betting and the current state-run lottery and to assure that the State will not conduct prohibited forms of gambling as part of the state-run lottery?"⁴⁸

The purpose of the 1993 amendment was to prevent the lottery from providing casino-style gambling.⁴⁹ Campaigning occurred on both sides.⁵⁰ Then-Governor Tommy G. Thompson and then-Attorney General Doyle made joint appearances urging a "yes" vote, characterizing the ballot question as an opportunity to restrict the expansion of gambling.⁵¹ Conversely, tribes generally opposed the ratification of the amendment because they feared it would jeopardize their existing compacts.⁵²

On the same ballot, voters answered advisory referendum questions related to riverboat gambling, casinos, video gambling, pari-mutuel on-track betting, and the continuation of the lottery.⁵³ State residents

45. *Id.* at 482.

46. RITSCH, *supra* note 38, at 23.

47. *Id.*

48. WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 1993-1994 BLUE BOOK 884 (1993). The Wisconsin Constitution provides the process for amending it. WIS. CONST. art. XII, § 2. First, both houses of the legislature must approve a proposed amendment in two successive sessions. *Id.* Then, the legislature must submit the proposed amendment to the people for approval. *Id.* If a majority of voters approve the proposal, it becomes part of the constitution. *Id.*

49. RITSCH, *supra* note 38, at 11.

50. *Id.* at 12.

51. *Id.*

52. *Id.*

53. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 48, at 886-89. The advisory

avored continuing the gambling in place but not expanding it.

E. The 1998 Gaming Compact Amendments

In late 1998 and early 1999, Governor Thompson and each of the tribes signed amendments that renewed the compacts for another five years.⁵⁴ These amendments did not include any new games.⁵⁵ However, the amendments to the FCP compact did allow the Tribe to start operating blackjack tables and 800 more slot machines at its Milwaukee location.⁵⁶

F. The 2003 Gaming Compact Amendments

Soon after Governor Doyle took office, news spread that various tribes had reached tentative agreements with the State on amendments to the gaming compacts.⁵⁷ This included news of the FCP amendments.⁵⁸ The compacts required tribes to make increased payments to the State, which would play a large role in addressing the deficit facing the State.⁵⁹ In exchange for the increased payments to the State, the FCP

referendum were as follows: Gambling Casinos on Excursion Vessels Advisory Referendum (Ballot question: "Do you favor a law that would allow gambling casinos on excursion vessels operating in this state on the Mississippi River, Lake Michigan and Lake Superior?"; rejected April 6, 1993 by a vote of 465,432 for and 604,289 against), *id.* at 886; Restriction on Gambling Casinos in the State Advisory Referendum (Ballot question: "Do you favor a constitutional amendment that would restrict gambling casinos in this state?"; approved Apr. 6, 1993 by a vote of 646,827 for and 416,722 against), *id.* at 886-87; Video Poker and Other Forms of Video Gambling Advisory Referendum (Ballot question: "Do you favor a law that would allow video poker and other forms of video gambling in this state?"; rejected April 6, 1993 by a vote of 358,045 for and 702,864 against), *id.* at 887; Pari-Mutuel On-Track Betting Advisory Referendum (Ballot question: "Do you favor continuing to allow pari-mutuel on-track betting on races in this state, such as horse, dog and snowmobile?"; approved April 6, 1993 by a vote of 548,580 for and 507,403 against), *id.* at 888; State-Operated Lottery Advisory Referendum (Ballot question: "Do you favor continuing to allow the state-operated lottery?"; approved April 6, 1993 by a vote of 773,306 for and 287,585 against), *id.* at 889.

54. See RITSCH, *supra* note 38, at 25-28.

55. *Id.*

56. Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992 (signed Dec. 3, 1998), http://www.doa.state.wi.us/docs_view2.asp?docid=2154.

57. Chaptman, *supra* note 4.

58. Walters & Chaptman, *supra* note 7.

59. Amy Rinard, *If State Gives a Little, It Can Take More from Casinos, Tribes Say*, MILWAUKEE J. SENTINEL, Feb. 18, 2003, at 1A (reporting that "Gov. Jim Doyle . . . proposed increasing nearly fivefold—to a minimum of \$237 million over two years—payments made to the state by Indian tribes that operate casinos in Wisconsin").

specifically would receive (1) more games, including keno, roulette, craps, and non-house banked card games, (2) a perpetual compact, and (3) a partial waiver of the State's sovereign immunity.⁶⁰

The Wisconsin Legislature raised concerns about the amendments.⁶¹ Within hours of learning of the new compact terms, the legislature called itself into an extraordinary session to pass Senate Bill 41.⁶² The bill proposed the creation of section 14.035(2), which would have required the governor to submit proposed compacts or compact amendments to the legislature for its approval.⁶³ Legislators introduced Senate Bill 41 on February 20, 2003, and passed it through both houses of the legislature the next day.⁶⁴ The Governor vetoed it on February 28, 2003.⁶⁵ The senate failed to override the Governor's veto on March 4, 2003.⁶⁶ Senate Bill 41 went from cradle to grave in just twelve days.

The legislature next worked to enact Assembly Bill 144.⁶⁷ This bill also required legislative approval of compacts or compact amendments.⁶⁸ In addition, Assembly Bill 144 limited the length of any compacts and prohibited "compact terms that in any way condition which gaming activities may be conducted under the compact based on gaming activities that are conducted in Canada."⁶⁹ Legislators added the latter provision after discovering that a clause in the compact amendments allowed tribes to offer games that casinos within a seventy-five mile radius of Wisconsin's borders offered.⁷⁰ Because the Canadian border was within the seventy-five mile radius, legislators did not want a foreign nation's gaming policies affecting Wisconsin's policies.⁷¹

60. Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, http://www.doa.state.wi.us/docs_view2.asp?docid=2154 (last visited October 12, 2005).

61. Walters & Chaptman, *supra* note 7.

62. Chaptman, *supra* note 4.

63. S.B. 41, 2003-04 Leg., Reg. Sess. (Wis. 2003).

64. History of S.B. 41, 2003-05 Sess. (Wis. 2003), available at <http://www.legis.state.wi.us/2003/data/SB41hst.html>.

65. *Id.*

66. *Id.*

67. Dennis Chaptman, *Assembly Approves New Tribal Gaming Bill; Lawmakers Would Get Final Say on Long-Term Compacts*, MILWAUKEE J. SENTINEL, Mar. 12, 2003, at 14A.

68. A.B. 144, 2003-05 Session (Wis. 2003).

69. *Id.*

70. Steve Schultze, *Revisions to Gaming Compact in Works; Changes a Response to GOP Suit; U.S. Decision on Deal Expected Today*, MILWAUKEE J. SENTINEL, Apr. 6, 2003, at 2B (reporting that Senator Panzer said, "With the 75-mile rule, you basically let other states and Canada affect what you do here").

71. *Id.*

Legislators introduced Assembly Bill 144 on March 6, 2003.⁷² It passed both houses of the legislature by March 13, 2003, and the Governor vetoed it on March 18, 2003.⁷³

After failing to override the Governor's veto, Senate Majority Leader Mary Panzer and Assembly Speaker John Gard filed suit against Governor Doyle for exceeding his authority in signing the FCP compact amendments.⁷⁴

III. *PANZER V. DOYLE*

In *Panzer*, the legislators claimed that the Governor acted improperly in agreeing to the parts of the 2003 amendments that (1) made the compacts perpetual, (2) waived the State's sovereign immunity, and (3) expanded the forms of gaming the Tribe could offer.⁷⁵ The court viewed the case as "present[ing] questions about the inherent and delegated power of Wisconsin's governors to negotiate gaming compacts with Indian tribes,"⁷⁶ which the Wisconsin Supreme Court had "the right and duty to resolve."⁷⁷ The court concluded that in signing the 2003 amendments to the FCP compact, Governor Doyle (A) usurped legislative power and (B) failed to faithfully execute the laws prohibiting certain forms of gambling. Accordingly, the court held that Governor Doyle lacked the authority to agree to provisions making compacts perpetual, waiving sovereign immunity, or adding new forms of games prohibited by State law.

A. The Governor's Usurpation of Legislative Power

The *Panzer* court held that Governor Doyle usurped legislative power by (1) agreeing to a perpetual compact and (2) partially waiving the State's sovereign immunity.⁷⁸ The court applied separation of powers analysis to both of these issues⁷⁹ and determined that negotiating compacts and waiving sovereign immunity constituted legislative

72. A.B. 144 Bill History, 2003-05 Sess. (Wis. 2003), available at <http://www.legis.state.wi.us/2003/data/AB144hst.html>.

73. *Id.*

74. Chaptman, *supra* note 11.

75. *Panzer v. Doyle*, 2004 WI 52, ¶ 3, 680 N.W.2d 666, 670.

76. *Id.* ¶ 2, 680 N.W.2d at 670.

77. *Id.* ¶ 102 n.41, 680 N.W.2d at 698.

78. *See id.* ¶ 5, 680 N.W.2d at 670.

79. *Id.* ¶ 47, 680 N.W.2d at 684.

powers.⁸⁰

1. The Governor Lacks the Authority to Agree to Perpetual Compacts

The legislators claimed that Governor Doyle lacked the authority to agree to terms that made the compact perpetual.⁸¹ The 2003 amendments stated the following: "This Compact shall continue in effect until terminated by mutual agreement of the parties, or by a duly adopted ordinance or resolution of the Tribe revoking the authority of the Tribe to conduct Class III gaming upon its lands."⁸² This language replaced a provision that allowed either party to not renew the compact every five years.⁸³ The *Panzer* court concluded that the legislature had not granted the governor the authority to agree to this change.⁸⁴

The *Panzer* court reached its conclusion after deeming the negotiation of gaming compacts under IGRA a legislative function.⁸⁵ The legislature delegated its authority to negotiate gaming compacts through section 14.035 of the Wisconsin Statutes.⁸⁶ Section 14.035 granted the governor the authority to negotiate on behalf of the State over Indian gaming compacts.⁸⁷ The *Panzer* court considered this a constitutional delegation of legislative power.⁸⁸ Specifically, section 14.035 satisfied the nondelegation doctrine⁸⁹ because safeguards remained in place for the legislature to regain or curtail the governor's

80. *Panzer*, 2004 WI 52, ¶¶ 64, 108, 680 N.W.2d at 684, 699.

81. *Id.* ¶ 3, 680 N.W.2d at 670.

82. Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as amended, December 3, 1998, § XXV(B) (signed Feb. 19, 2003), http://www.doa.state.wi.us/docs_view2.asp?docid=2155.

83. Forest County Potawatomi Community of Wisconsin and State of Wisconsin Gaming Compact of 1992, § XXV (B), 33-34 (signed Aug. 4, 1992), http://www.doa.state.wi.us/docs_view2.asp?docid=2153.

84. *Panzer*, 2004 WI 52, ¶ 82, 680 N.W.2d at 692.

85. *Id.* ¶ 64, 680 N.W.2d at 687-88.

86. WIS. STAT. §14.035 (2003-04).

87. *Panzer*, 2004 WI 52, ¶¶ 52-54, 680 N.W.2d at 684-85.

88. *Id.* ¶ 72, 680 N.W.2d at 689.

89. *Id.* ¶¶ 52-54, 680 N.W.2d at 684-85. The nondelegation doctrine arises when a branch delegates its power to another. *Id.* ¶ 52, 680 N.W.2d at 684. The nondelegation doctrine provides that a branch may not delegate power to another branch to the point that the other branch has too much power. *Id.* A lawful delegation of power establishes the fundamentals, while allowing the other branch to oversee the details. *Id.* at ¶ 54, 680 N.W.2d at 685. As a result, in analyzing delegations courts focus on (1) the nature of the delegated power and (2) the presence of adequate safeguards. *Id.*

power.⁹⁰ The safeguards of section 14.035 include the legislature's ability to (1) repeal it, (2) amend it, or (3) appeal to public opinion.⁹¹ The Governor acted beyond the scope of his power by agreeing to perpetual compacts because such a duration—or lack there of—undercut the safeguards that kept section 14.035 constitutional under the nondelegation doctrine.⁹²

2. The Governor Lacks the Authority to Waive Sovereign Immunity

The legislators claimed that Governor Doyle lacked the authority to waive the State's sovereign immunity.⁹³ The 2003 amendments stated, "The Tribe and the State expressly waive any and all sovereign immunity with respect to any claim brought by the State or the Tribe to enforce any provision of this Compact."⁹⁴ After the legislators filed suit, the Governor and the Tribe agreed to a technical amendment. It read: "The Tribe and the State, *to the extent the State or the Tribe may do so pursuant to law*, expressly waive any and all sovereign immunity with respect to any claim brought by the State or the Tribe to enforce any provision of this compact."⁹⁵ The *Panzer* court concluded that the Governor had waived the State's sovereign immunity, even with the technical amendment.⁹⁶

Only the legislature has authority to waive the State's sovereign immunity.⁹⁷ Any delegation of this authority, through the designation of an agent, must occur clearly and expressly.⁹⁸ The court found no such delegation.⁹⁹ Therefore, the court deemed the waiver of sovereign immunity void because the Governor had exercised a legislative power in violation of the separation of powers established by the Wisconsin

90. *Id.* ¶ 72, 680 N.W.2d at 689.

91. *Id.* ¶ 71, 680 N.W.2d at 689.

92. *Id.*

93. *Panzer*, 2004 WI 52, ¶ 3, 680 N.W.2d at 670.

94. Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as amended, December 3, 1998, § XXIII(C) (signed Feb. 19, 2003), http://www.doa.state.wi.us/docs_view2.asp?docid=2155.

95. Technical Amendment to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as amended, 6 (signed May 2003) (emphasis added), http://www.doa.state.wi.us/docs_view2.asp?docid=2157.

96. *Panzer*, 2004 WI 52, ¶ 106, 680 N.W.2d at 699.

97. *Id.* ¶ 108, 680 N.W.2d at 699.

98. *Id.* ¶ 109, 680 N.W.2d at 699-700.

99. *Id.* ¶ 110, 680 N.W.2d at 700.

Constitution.¹⁰⁰

B. The Governor's Failure to Faithfully Execute Gambling Laws

The legislators claimed that the Governor agreed to games not permitted under State law.¹⁰¹ The agreement reached by the Governor and the Tribe authorized the Tribe to offer added variations on blackjack, pari-mutuel wagering, electronic keno, and casino table games, including roulette, craps, and poker.¹⁰² The *Panzer* court held that Governor Doyle acted contrary to public policy and without authority when he agreed to the additional games.¹⁰³

For the court to properly determine whether the Governor overstepped his authority in agreeing to new games, it needed to understand the framework for compact negotiations established by Congress in IGRA.¹⁰⁴ Although IGRA establishes that tribes and states should compact related to Class III gaming activity, the law does not clearly identify the scope of negotiable games. The law states that "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity."¹⁰⁵ Courts have interpreted this language when determining the scope of negotiable games.¹⁰⁶ However, disagreement exists on the proper interpretation.¹⁰⁷ Some courts have interpreted it as making all forms of Class III games negotiable if a state permits any form of Class III gaming.¹⁰⁸ Other

100. *Id.*

101. *Id.* ¶ 3, 680 N.W.2d at 670.

102. Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as amended, December 3, 1998, (signed Feb. 19, 2003), http://www.doa.state.wi.us/docs_view2.asp?docid=2155.

103. *Panzer*, 2004 WI 52, ¶ 5, 680 N.W.2d at 670. In *Dairyland Greyhound Park v. Doyle*, 2005 WI 21, 693 N.W.2d 78 (petition by the court of appeals to certify granted), the Wisconsin Supreme Court will address whether the compacts that allow the tribes to offer games agreed to in the 1992 compacts, and continued based on the 1998 amendments, violate article IV, section 24 of the Wisconsin Constitution.

104. *Id.* ¶ 92, 680 N.W.2d at 695-96.

105. 25 U.S.C. § 2710(d)(1)(B).

106. See *Panzer*, 2004 WI 52, ¶ 92, 680 N.W.2d at 695-96 (citing *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 486 (W.D. Wis. 1991)); see also *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 99 F.3d 321 (9th Cir. 1996); see also *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993).

107. See *id.*; see also *Washburn*, *supra* note 30, at 442.

108. See *Lac du Flambeau*, 770 F. Supp. at 486; see also *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650 (7th Cir. 2004).

courts have interpreted it as making negotiable only the forms of Class III activities that a state permits.¹⁰⁹

After considering interpretations by various federal courts, the *Panzer* court concluded that IGRA created two categories of Class III games: (1) mandatory subjects of negotiation and (2) illegal subjects of negotiation.¹¹⁰ The *Panzer* court defined mandatory subjects of negotiation as those forms of Class III gaming permitted by the State.¹¹¹ Conversely, the *Panzer* court defined illegal subjects of negotiations in terms of the State's public policy towards gambling.¹¹² Considering the Wisconsin Constitution¹¹³ and criminal statutes,¹¹⁴ the court concluded that Wisconsin had a strong public policy against gambling.¹¹⁵ Therefore, according to the *Panzer* court's interpretation of IGRA, it is illegal for the State to negotiate with tribes over forms of gaming that are either not authorized by the constitution or barred by criminal statutes.¹¹⁶

The *Panzer* court rejected the notion that the only way to avoid negotiations over all forms of Class III games would be to criminally prohibit all forms of Class III games within the State.¹¹⁷

After analyzing IGRA, the *Panzer* court concluded that the Governor acted without authority when he agreed to games that were illegal subjects of negotiation.¹¹⁸ The nonnegotiable games included the variations on blackjack, electronic keno, and casino table games.¹¹⁹ The Governor's lack of authority to agree to these new games invalidated that section of the compact.¹²⁰

109. See *Rumsey*, 99 F.3d at 322; see also *Cheyenne River Sioux Tribe*, 3 F.3d at 279.

110. *Panzer*, 2004 WI 52, ¶ 91, 680 N.W.2d at 695.

111. *Id.* For example, Wisconsin permits pari-mutuel wagering. *Id.* ¶ 97, 680 N.W.2d at 697. Therefore, pari-mutuel wagering is a mandatory subject of negotiation. See *id.* ¶ 91, 680 N.W.2d at 695.

112. *Id.* ¶ 94, 680 N.W.2d at 696.

113. WIS. CONST. art. IV, § 24.

114. WIS. STAT. ch. 945.

115. *Panzer*, 2004 WI 52, ¶ 94, 680 N.W.2d at 696.

116. *Id.* ¶ 97, 680 N.W.2d at 697.

117. *Id.* ¶ 92, 680 N.W.2d at 695. The court's approach is inconsistent with *Lac du Flambeau*, 770 F. Supp. 480 (W.D. Wis. 1991). The *Lac du Flambeau* court held that Wisconsin was required to negotiate over the inclusion in the tribal-state compact "any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law." *Id.* at 488.

118. *Panzer*, 2004 WI 52, ¶ 97, 680 N.W.2d at 697.

119. *Id.*

120. *Id.*

IV. THE GOVERNOR'S NEW HAND FOR NEGOTIATING INDIAN GAMING COMPACTS

Panzer affirms that for Indian gaming compact negotiations the governor acts as the sole negotiator on behalf of the State of Wisconsin.¹²¹ But, the court also outlined the restrictions that Wisconsin constitutional law places on his authority.¹²² According to the *Panzer* holdings, when renegotiating the amendments to the gaming compacts, the governor must (1) ensure the compacts retain a duration, (2) not waive the State's sovereign immunity, and (3) negotiate over only games permitted by the constitution and not prohibited by criminal statutes.¹²³

Seventeen months after the *Panzer* court ruled, Governor Doyle and the FCP announced new amendments.¹²⁴ The 2005 amendments (1) provided for nonrenewal by either party after twenty-five years, (2) removed the language that constituted a waiver of sovereign immunity, and (3) left unamended the section addressing the games the Tribe may offer.¹²⁵ Within days, a petition had been filed with the Wisconsin Supreme Court to have the new 2005 amendments deemed unconstitutional for failing to comply with *Panzer*, specifically related to the games the Tribe would be allowed to continue to offer.¹²⁶ This part of the note considers the meaning of the *Panzer* holdings, specifically related to their impact on future negotiations and whether the new 2005 amendments comply with the holdings.

121. See *id.* ¶ 72, 680 N.W.2d at 689. The court deemed section 14.035 a constitutional delegation of power. *Id.*

122. *Id.* ¶ 113, 680 N.W.2d at 701.

123. See *id.*

124. David Callender, *Potawatomi to Pay State \$43.6 Million; Pact Gives 8% of Casino Profit*, THE CAPITAL TIMES, Oct. 5, 2005, at 3A.

125. 2005 Amendment to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as Amended, (signed Oct. 4, 2005), http://www.doa.state.wi.us/docs_view2.asp?docid=5275.

126. Patrick Marley, *Dog Track Challenges New Casino Pact; Potawatomi Deal Still Unconstitutional, Dairyland Says*, MILWAUKEE J. SENTINEL, Oct. 12, 2005, at 3B (reporting that the petition stated, "For the governor to ignore a Supreme Court decision that directly invalidated his previous action regarding the scope of games in the (Potawatomi) compact is stunning. It is a direct failure to faithfully adhere to Wisconsin law."). The petition was made within the context of *Dairyland Greyhound Park v. Doyle*, 2004 WI 34, 677 N.W.2d 275 (petition by the Court of Appeals to Certify granted), which presents the question of whether Indian casinos are unconstitutional because of the 1993 constitutional amendment that bars casino-style gambling in Wisconsin. The court heard oral arguments in the case on September 7, 2005, and had not yet ruled when Dairyland Greyhound Park made its petition to deem the October 5, 2005, amendments unconstitutional.

*A. The Duration Must Keep the Nondelegation Doctrine
Safeguards Intact*

The *Panzer* court did not specify an appropriate duration for Indian gaming compacts.¹²⁷ Some of the tribes' compact amendments included a clause that made the duration ninety-nine years, if a court invalidated the perpetual term.¹²⁸ Although the FCP amendments did not include such a provision, the Tribe's Attorney General suggested that the Tribe may seek a similar duration.¹²⁹ Regardless of the specific duration, the tribes desire long-term compacts that will allow them to secure long-term financing for expansion.¹³⁰ Additionally, long-term compacts would insulate the tribes from political conflicts like the one surrounding the 2003 amendments.¹³¹

However, the nondelegation doctrine, and the requisite safeguards that must remain intact, may prevent the tribes from getting long-term compacts. The *Panzer* court suggested that the problem with perpetual compacts would be that the legislature would lose its ability to alter the State's position on Indian gaming by repealing or amending section 14.035.¹³² Additionally, the court criticized perpetual compacts for not allowing a potentially disapproving electorate to elect a new governor that would negotiate different compact terms.¹³³ Compacts lasting ninety-nine years would present similar problems as perpetual compacts. If future courts share the *Panzer* court's concerns, it seems

127. See *Panzer*, 2004 WI 52, ¶ 82, 680 N.W.2d at 692.

128. Second Amendment to the Oneida Tribe of Indians of Wisconsin and the State of Wisconsin Gaming Compact of 1991, § 25, http://www.doa.state.wi.us/docs_view2.asp?docid=-2150. The clause reads, "If the provisions [making the compact perpetual] are determined to be invalid or unlawful by a court of competent jurisdiction, the term of this Compact shall expire April 25, 2102." *Id.*

129. See Stacy Forster & Patrick Marley, *State, Tribe Plan to Reopen Talks Soon; Potawatomi May Seek 99-Year Gaming Compact; Republicans Urge Taking Bigger Cut of Revenue*, MILWAUKEE J. SENTINEL, May 15, 2004, at 1B (reporting that the Doyle Administration and Assembly Speaker Gard disagreed on the types of terms that should be part of the gaming compacts).

130. Steve Schultze, *Seven More Tribes Sign Gaming Compacts; Casino Deals Would be Permanent*, MILWAUKEE J. SENTINEL, Apr. 26, 2003, at 1A.

131. Interview by Jeff Mayers with Jeff Crawford, Attorney General, Forest County Potawatomi Tribe, in PLACE (June 7, 2004).

132. *Panzer*, 2004 WI 52, ¶ 79, 680 N.W.2d at 691. See also Forster & Marley, *supra* note 129 (reporting that Speaker Gard said a ninety-nine year term for the FCP compact was "way too long," and he commented that "[s]ometimes it seems like [the Doyle Administration is] sitting on the wrong side of the negotiations. It seems like they're advocating for the tribes and not advocating for the taxpayers.").

133. *Panzer*, 2004 WI 52, ¶ 79, 680 N.W.2d at 691.

likely that a permissible duration would be closer to the five years agreed upon in 1992, rather than ninety-nine years.

The 2005 amendments establish an initial duration of twenty-five years for the compact.¹³⁴ If neither party serves the other with a notice of nonrenewal within 180 days prior to the compact's expiration, the compact will automatically renew.¹³⁵ For the State to serve notice, the legislature must first pass a statute directing the governor to provide such service.¹³⁶

As with any other statute, the governor could presumably veto one passed by the legislature to direct him or her to serve notice. Therefore, if the governor does not wish to serve notice, the legislature would need a two-thirds vote in both houses of the legislature to override the governor's veto before it could direct the governor to serve notice. Considering that the legislature has not overridden a veto in two decades,¹³⁷ the notice procedure provided by the amendment leaves the power to renew the compacts mostly with the governor. This likely would not raise a constitutional problem for a court applying *Panzer*. The *Panzer* court itself concluded that the legislature's ability to amend or repeal section 14.035, which would face the same veto threat, constituted a safeguard in the context of the nondelegation doctrine.

Another nondelegation safeguard a court would need to consider would be whether the legislature could effectively appeal to the electorate with a twenty-five year compact duration. In this context, a twenty-five year duration may raise a constitutional problem. Between now and 2035, when the compacts would be up for renewal under the 2005 amendments, Wisconsin will have eight gubernatorial elections and sixteen legislative elections. Under the pre-2003 amendments, which had a five-year duration, there would usually be one gubernatorial election and two legislative elections between renewals. The ability of the electorate to act on any appeals by the legislature would be reduced under the 2005 amendments when compared with the pre-2003 amendments. Whether the new twenty-five year duration stands up to scrutiny will likely turn on a court's perception of what constitutes an

134. 2005 Amendment to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as Amended, (signed Oct. 4, 2005), http://www.doa.state.wi.us/docs_view2.asp?docid=5275.

135. *Id.*

136. *Id.*

137. Stacy Forster & Steven Walters, *2nd Test Set Over Nursing Homes; Senate Republicans Aim to Rebuff Doyle's Fee-Raise Veto Tuesday*, MILWAUKEE J. SENTINEL, September 22, 2005, at 1B.

effective appeal to the electorate.

B. The Governor May Not Waive Sovereign Immunity

The *Panzer* court made clear that the governor does not have authority to waive the State's sovereign immunity.¹³⁸ Therefore, any waiver in a compact amendment would require legislative involvement in the negotiation process. Based on the technical amendment agreed upon by the Governor and FCP, which purported to be a nonwaiver of sovereign immunity, a waiver of the State's sovereign immunity does not seem to rise to a level that would induce the Governor to get the legislature involved in the negotiation process. The parties made this even cleaner in the 2005 amendments by removing entirely the language that the *Panzer* court deemed invalid.¹³⁹

C. Amendments Must Keep New Games Limited to Pari-Mutuel Wagering

Related to the scope of negotiable games, *Panzer* held that the governor may negotiate over games permitted by the constitution and not prohibited by the criminal statutes.¹⁴⁰ This means that the governor may not agree to the tribes offering variations of blackjack, keno, roulette, craps, or poker.¹⁴¹ This leaves pari-mutuel wagering as the only new game the governor may offer the tribes under current law.¹⁴² Such a limit on games the tribes may offer would substantially reduce the potential revenue they can generate.¹⁴³

Under the 2005 amendments, the FCP would be able to offer the same games it could under the 2003 amendments.¹⁴⁴ The *Panzer* court deemed that arrangement under the 2003 amendments

138. *Panzer*, 2004 WI 52, ¶ 108, 680 N.W.2d at 699.

139. 2005 Amendment to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as Amended, (signed Oct. 4, 2005), http://www.doa.state.wi.us/docs_view2.asp?docid=5275.

140. *Panzer*, 2004 WI 52, ¶ 97, 680 N.W.2d at 697.

141. *Id.*

142. *Id.*

143. George R. Lewis, Op-Ed, *Ho-Chunk Will Pay When Tribe Has Compact*, WIS. ST. J., Feb. 6, 2005, at B2. George R. Lewis is president of the Ho-Chunk Nation, a federally recognized tribe in Wisconsin.

144. 2005 Amendment to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as Amended, (signed Oct. 4, 2005), http://www.doa.state.wi.us/docs_view2.asp?docid=5275.

unconstitutional.¹⁴⁵ Considering that nothing has changed related to the State's gambling laws since the *Panzer* ruling on the 2003 amendments, a court applying *Panzer* would presumably find that portion of the compact invalid again. However, the make-up of the Wisconsin Supreme Court has changed.¹⁴⁶ The influence of that change on Indian gaming, if any, will be seen in future cases applying *Panzer*.

V. AN AFFIRMATION OF THE *PANZER* COURT'S JURISDICTION

Upon the Wisconsin Supreme Court releasing its *Panzer* decision, the Governor suggested that federal courts would need to determine the scope of negotiable games.¹⁴⁷ The tribes agreed.¹⁴⁸ The dissent itself cautioned that "the issue of federal preemption [was] lurking."¹⁴⁹ The dissent went so far as to conclude that the Wisconsin Supreme Court lacked jurisdiction to adjudicate the legislators' claim related to the scope of negotiable games.¹⁵⁰ Some political observers believe this interpretation of the law is misguided and potentially undercuts the precedential value of *Panzer*.¹⁵¹ This part of the note explains why suggestions that federal law preempts State law in this instance are

145. *Panzer*, 2004 WI 52, ¶ 97, 680 N.W.2d at 697.

146. Compare Associated Press, *Sykes to Begin 10-Year Court Term: Election Secures the Current Majority*, DUBUQUE TELEGRAPH HERALD, Apr. 6, 2000, at 12A (reporting that University of Wisconsin Political Science Professor Herbert Kritzer said, after Justice Sykes won election to the Wisconsin Supreme Court in 2000, "her conservative views would align her on the court with Justices Patrick Crooks, David Prosser and Jon Wilcox. Chief Justice Shirley Abrahamson and Justices William Bablitch and Ann Walsh Bradley form the court's more liberal voting block."), with Derrick Nunnally, *Justice Urges Support of State Supreme Court; Butler Rebuts Criticism That Judges Have Exceeded Their Authority*, MILWAUKEE J. SENTINEL, Sept. 24, 2005, at 2B (reporting that Justice Bulter, who was appointed to the Wisconsin Supreme Court in August 2004 to replace Justice Sykes, addressed "[a] spate of recent civil cases decided by the Supreme Court . . . [that] have drawn heavy fire from conservatives").

147. Forster & Marley, *supra* note 129. See also Press Release, Office of Governor Jim Doyle, Statement of Governor Doyle Regarding Indian Gaming Lawsuit (May 13, 2004) (on file with author) ("The deeply divided Court . . . raised several specific questions about the terms of the compacts. These questions must either be answered by a federal court—which is likely considering that Indian gaming is covered by federal law, not state law—or through further discussions with the Tribes.").

148. Forster & Marley, *supra* note 129.

149. *Panzer*, 2004 WI 52, ¶ 236, 680 N.W.2d at 728.

150. *Id.* ¶ 250, 680 N.W.2d at 731.

151. See Richard Jones, *High Court Revives Case Against Doyle; Authority to Negotiate Gaming Deals Challenged*, MILWAUKEE J. SENTINEL, June 13, 2003, at 3B (reporting that Speaker Gard said, "There's some very serious [Wisconsin] constitutional issues that should be resolved by the court that resolves them, the state Supreme Court.").

mistaken.

A. A Proper Appreciation of IGRA's Preemptive Force

IGRA preempts state law related to the *regulation* of Indian gaming.¹⁵² It does not, however, preempt state law related to the *negotiation* of tribal-state gaming compacts.¹⁵³ Therefore, had the *Panzer* court heeded the dissent's warning of lurking preemption, the application of Wisconsin law would have been unnecessarily eliminated from any consideration of the tribal-state compact negotiation process.

Federal courts agree that issues related to the negotiation process do not fall within the scope of IGRA's complete preemption.¹⁵⁴ In *Gaming Corp. of America v. Dorsey & Whitney*,¹⁵⁵ the United States Court of Appeals for the Eighth Circuit held that IGRA completely preempts state law related to the *regulation* of Indian gaming.¹⁵⁶ The *Gaming Corp. of America* court indicated that the preemptive force does not preempt state law related to the *negotiation* of gaming compacts.¹⁵⁷ Courts applying the *Gaming Corp. of America* holding have also found that the compact negotiation process does not fall within the scope of IGRA's preemptive force.¹⁵⁸ Absent IGRA's preemptive force, State law has a role in determining questions related to the tribal-state compact negotiation process.¹⁵⁹ The United States Court of Appeals for the Tenth Circuit has found, since the holding in *Gaming Corp. of America*, that state law applies in determining whether a state has bound itself to a compact.¹⁶⁰

The *Panzer* dissent characterized the majority's holding that the Governor exceeded his constitutional authority in agreeing to certain new games as "miss[ing] the mark because it rests on an erroneous assumption that states can directly regulate Indian gaming They cannot. Under IGRA, state law can only indirectly affect Indian

152. See *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996); see also *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997).

153. *Id.*

154. *Id.*

155. 88 F.3d 536 (8th Cir. 1996).

156. *Id.* at 544.

157. *Id.* at 547.

158. *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1052 (D. Ariz. 2001); *Oneida Indian Nation v. County of Oneida*, 132 F. Supp. 2d 71, 76 (N.D. N.Y. 2000).

159. See *Pueblo of Santa Ana*, 104 F.3d at 1557.

160. *Id.*

gaming, and only through compact negotiations.”¹⁶¹ Although an accurate statement of IGRA’s preemptive force, the assessment that the majority missed the mark rests on its own assumption that the legislators’ claim constitutes direct regulation of Indian gaming. To support its assumption, the dissent argued that because the Tribe and State entered into a valid compact in 1992, the negotiations are over.¹⁶² Adopting this approach, that IGRA completely preempts State law, would have converted the legislators’ claim into a federal question.¹⁶³ In adjudicating the federal question, State law would have had no place.

The dissent’s assumption that the legislators’ claim is regulatory,¹⁶⁴ rather than as relating to the compact negotiation process, seems erroneous. The dissent itself does not even consistently apply its own characterization. Instead, it refers to the discussions between the Governor and the tribes over the gaming compacts as “negotiations,”¹⁶⁵ and refers to the Governor’s power to “negotiate.”¹⁶⁶ The dissent fails to explain how the negotiation phase of the tribal-state relationship could end with the valid 1992 compact,¹⁶⁷ yet the Governor still “negotiated”¹⁶⁸ with the tribes over the 2003 amendments.

The Tribe and the Governor *negotiated* the 2003 amendments. Accordingly, the legislators’ claim does not fall within the scope of

161. *Panzer*, 2004 WI 52, ¶ 237, 680 N.W.2d at 728-29.

162. *Id.* ¶ 208, 680 N.W.2d at 722.

163. See generally Black’s Law Dictionary 303 (8th ed. 2004) (defining the complete-preemption doctrine as “[t]he rule that a federal statute’s preemptive force may be so extraordinary and all-encompassing that it converts an ordinary state-common-law complaint into one stating a federal claim for purposes of the well-pleaded-complaint rule”).

164. *Panzer v. Doyle*, 2004 WI 52, ¶ 236-37, 680 N.W.2d 666, 728-29.

165. *Id.* ¶ 182, 680 N.W.2d at 715-16 (discussing the oversight role the legislature would have in the “negotiation process” under proposed legislation); *id.* ¶ 237, 680 N.W.2d at 728-29 (concluding that IGRA limits state law influence to the “negotiation process”); *id.* ¶ 262, 680 N.W.2d at 733 (suggesting that a provision in the compact allows the tribes to demand a “renegotiation”).

166. *Id.* ¶ 122, 680 N.W.2d at 703 (questioning why Governor Doyle could not constitutionally “negotiate” the 2003 amendment); *id.* ¶ 155, 680 N.W.2d at 712 (stating that current law allows the governor to “negotiate” the best terms); *id.* ¶ 160, 680 N.W.2d at 713 (suggesting the practicalities of “negotiating” that must be considered); *id.* ¶ 207, 680 N.W.2d at 722 (arguing that any Class III games could be “negotiated” for between a tribe and state); *id.* ¶ 221, 680 N.W.2d at 725 (concluding that the parties intended to have continuing agreements, subject to “negotiated” amendments).

167. *Id.* ¶ 208, 680 N.W.2d at 722 (The dissent wrote, “In *American Greyhound Racing, Inc. v. Hull*, the district court noted that ‘IGRA preemption blocks the operation of state policy once a valid compact is executed, but it gives effect to state public policy through the compact negotiation process.’ Because the State and Tribe entered into a valid compact in 1992, their agreement is insulated from further changes in Wisconsin’s gaming laws.”).

168. See *id.* ¶ 207, 680 N.W.2d at 722.

IGRA's complete preemption. The *Panzer* court correctly applied Wisconsin law in adjudicating the legislators' claim related to the scope of negotiable games.

B. The Panzer Court's Competence to Adjudicate Federal Questions

Even assuming, arguendo, that IGRA's preemptive force applied, the Wisconsin Supreme Court would still have jurisdiction to adjudicate the legislators' claim related to negotiable games.¹⁶⁹ The United States Supreme Court has long held that under the United States federal system "if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."¹⁷⁰ IGRA does not expressly or implicitly grant federal courts exclusive jurisdiction.¹⁷¹

An examination of the text of IGRA demonstrates a lack of an express grant of exclusive jurisdiction. 25 U.S.C. § 2710(d)(7)(A) of IGRA states that "[t]he United States district courts shall have jurisdiction."¹⁷² A comparison of this text to 28 U.S.C. § 1331,¹⁷³ which addresses federal questions, and 28 U.S.C. § 1334,¹⁷⁴ which address bankruptcy cases, indicates that Congress did not expressly grant federal courts exclusive jurisdiction over tribal-state compacts, neither their negotiation nor their regulation. 28 U.S.C. § 1331 states, "The district courts shall have *original jurisdiction* of all civil actions arising under the Constitution, laws, or treaties of the United States."¹⁷⁵ State courts have concurrent jurisdiction over § 1331 claims. Conversely, § 1334 provides an example of Congress granting federal courts exclusive jurisdiction.¹⁷⁶ Section 1334 states, "the district courts shall have *original and exclusive*

169. See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

170. *Id.* (quoting *Claffin v. Houseman*, 93 U.S. 130, 136 (1876)). The *Tafflin* Court wrote, "We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Claffin*, 493 U.S. at 548.

171. 25 U.S.C. § 2710(7)(A) (2000).

172. *Id.*

173. 28 U.S.C. § 1331 (2000).

174. 28 U.S.C. § 1334 (2000).

175. § 1331 (emphasis added).

176. § 1334.

jurisdiction of all cases under title 11.”¹⁷⁷ The IGRA grant of jurisdiction mirrors the nonexclusive grant in § 1331, as compared to the exclusive grant in § 1334.

An examination of other jurisdictional grants by Congress related to Indian affairs indicates a lack of any implied grant of exclusive jurisdiction. Congress knows how to grant exclusive jurisdiction related to Indian gaming, as illustrated by 18 U.S.C. § 1166.¹⁷⁸ The statute states, “The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws”¹⁷⁹ This exclusive grant of jurisdiction clearly does not extend to claims over compact negotiations. Congress has also chosen not to grant exclusive jurisdiction in other statutes related to Indian affairs.¹⁸⁰ As the statutes illustrate, Congress appreciates how to grant exclusive jurisdiction, rather than concurrent jurisdiction, and has not done so related to tribal-state compacts.

Nevertheless, the dissent stated that IGRA “contemplates actions only in federal—not state—courts.”¹⁸¹ Coupled with the dissent’s statement that the *Panzer* court lacked jurisdiction to adjudicate the legislators’ claim,¹⁸² this indicates that the dissent implied that IGRA granted federal courts exclusive jurisdiction.

This is unpersuasive. The *Panzer* dissent relies on the findings of federal courts that discussed IGRA’s preemptive force related to *regulating* Indian gaming.¹⁸³ As indicated above, federal courts agree that the regulation of gaming falls within IGRA’s preemptive force.¹⁸⁴ The federal courts, however, also agree that the *negotiation* of gaming compacts does not fall within IGRA’s preemptive force.¹⁸⁵ The dissent seemingly bases its implication that IGRA granted exclusive jurisdiction

177. *Id.* (emphasis added).

178. 18 U.S.C. § 1166 (2000).

179. *Id.*

180. 28 U.S.C. § 1360 (2000) states that “[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” Additionally, 28 U.S.C. § 1362 (2000) states that “[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.”

181. *Panzer*, 2004 WI 52, ¶ 242, 680 N.W.2d at 729.

182. *Id.* ¶ 250, 680 N.W.2d at 731.

183. *Id.* ¶¶ 239-243, 680 N.W.2d at 729-30.

184. See *supra* text accompanying notes 154-160.

185. *Id.*

on its overly broad assumption related to the scope of IGRA's preemptive force.

Absent Congress granting federal courts exclusive jurisdiction, state courts have a duty to adjudicate federal questions raised.¹⁸⁶ Accordingly, even assuming, arguendo, that IGRA's preemptive force applied to compact negotiations, the *Panzer* court would not only still have jurisdiction to adjudicate the legislators' claim related to negotiable games, but would have a duty to do so.

C. Supremacy of Federal Law, Not Supremacy of All Federal Courts

The only federal court decisions that have preemptive force are those decided by the United States Supreme Court.¹⁸⁷ The United States Court of Appeals for the Seventh Circuit has recognized that its opinions, and those of the district courts within it, do not bind state courts.¹⁸⁸

The dissent argued that the *Panzer* court lacked jurisdiction to adjudicate the legislators' negotiable games claim because a federal court had already resolved the scope of negotiable games.¹⁸⁹ In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, the court held that Wisconsin was required to negotiate over "any activity

186. See *Howlett v. Rose*, 496 U.S. 356, 367 (1990) ("Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure").

187. See generally Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 742 (1995) (writing, "When a state court decides federal issues, it owes no fealty to the inferior federal courts in its region, including the local court of appeals. State trial courts owe obedience on federal issues only to the higher state courts and the Supreme Court of the United States.").

188. See *Smith v. Wis. Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1139 n.10 (7th Cir. 1994) ("While we might expect our exposition of federal constitutional law to inform a state court decision addressing the point, our decision does not bind the Wisconsin state courts. See also *Freeman v. Lane*, 962 F.2d 1252 (7th Cir.1992) (stating that the Supremacy Clause does not require Illinois Courts to follow Seventh Circuit precedent)").

189. *Id.* ¶ 202, 680 N.W.2d at 720-21 (recognizing that in *Forest County Potawatomi Community v. Norquist*, 45 F.3d 1079, 1083 (7th Cir. 1995), the United States Court of Appeals for the Seventh Circuit stated that whether the State of Wisconsin permitted Class III gaming, as required by 25 U.S.C. 2710 (d)(1)(B), is resolved by (1) the *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991), holding and (2) the existence of compacts between the tribes and the State).

that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin Constitution or State law.”¹⁹⁰ According to the dissent, this holding, coupled with the 1992 law-of-the-compact clause,¹⁹¹ clearly established the scope of negotiable games as long as the compact continued.¹⁹² The dissent went so far as to argue that the federal district court’s decision actually limited the *Panzer* court’s jurisdiction.¹⁹³

Although *Lac du Flambeau* could have been persuasive authority for the *Panzer* court, its holding would not strip the court of its jurisdiction. The *Panzer* court correctly adjudicated the legislators’ claim, with a proper deference to the federal courts.

In sum, the Governor and the dissent made misguided comments about the “lurking” preemption in *Panzer*. Appreciating that the *Panzer* court had jurisdiction to adjudicate all of the legislators’ claims has importance when future courts weigh the precedential value of *Panzer*. Based on the court’s jurisdiction, and our federalist system, it has the weight of any other Wisconsin Supreme Court decision that resolved claims raising separation of power issues in the context of the Wisconsin Constitution.

VI. CONCLUSION

In *Panzer*, the Wisconsin Supreme Court correctly addressed separation of powers issues raised by the legislators. Contrary to the Governor’s comments and the dissent, nothing about IGRA allowed the Governor to act as an extra-constitutional agent for the State. The Wisconsin Supreme Court correctly held that the Governor abused his delegated authority and failed to faithfully execute State law. Accordingly, if courts follow *Panzer*, future Wisconsin governors should

190. *Lac du Flambeau*, 770 F. Supp. 480.

191. *Panzer*, 2004 WI 52, ¶ 194, 680 N.W.2d at 718 (quoting Forest County Potawatomi Community of Wisconsin and State of Wisconsin Gaming Compact of 1992, § XXVI (signed Aug. 4, 1992), http://www.doa.state.wi.us/docs_view2.asp?docid=2153).

192. *Id.* ¶ 205, 680 N.W.2d at 721.

193. *See id.* ¶¶ 239-40, 680 N.W.2d at 729. The dissent stated:

[T]he question in this case concerning the permissible scope of gaming is the same one addressed in *Lac du Flambeau*, as well as numerous federal court cases. . . . Instead of recognizing this limitation to its jurisdiction, however, the majority proceeds to analyze IGRA, going so far as to call *Lac du Flambeau*’s holding into doubt.

Id.

negotiate amendments to gaming compacts that include a finite duration, do not waive the State's sovereign immunity, and permit tribes to offer only those games allowed by State law.

Wisconsin has had a long and turbulent history with gambling. Had the 2003 amendments to the Indian gaming compacts been valid, they would have likely put the issue to rest. The tribes would have had a near monopoly over gambling in perpetuity. Yet *Panzer* has made it likely that the simmering public policy debate over gambling and Indian gaming in Wisconsin will continue for generations to come. Fortunately, the *Panzer* court has provided a clear constitutional framework for the process.

JAMES J. WAWRZYN

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